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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96842; File No. SR-MSRB-2023-02]

Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Notice of Filing of a Proposed Rule Change to Create New MSRB Rule G-46, on Duties of Solicitor Municipal Advisors, and to Amend MSRB Rule G-8, on Books and Records

February 8, 2023

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 31, 2023, the Municipal Securities Rulemaking Board (“MSRB” or “Board”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the MSRB. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The MSRB filed with the Commission a proposed rule change to create a new rule, MSRB Rule G-46, on duties of solicitor municipal advisors (“Proposed Rule G-46”)

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

and amend MSRB Rule G-8, on books and records (“Proposed Amended Rule G-8”) (together, the “proposed rule change”). The MSRB requests that the proposed rule change be approved with an implementation date to be announced by the MSRB in a regulatory notice published no later than one month following the Commission approval date, which implementation date shall be no later than twelve months following the Commission approval date.

The text of the proposed rule change is available on the MSRB’s website at <https://msrb.org/2023-SEC-Filings>, at the MSRB’s principal office, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the MSRB included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The MSRB has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Solicitor Municipal Advisor Activity

There are two broad categories of municipal advisors—those that provide certain advice to or on behalf of a municipal entity or obligated person and those that undertake certain solicitations of a municipal entity or obligated person on behalf of certain third-

party financial professionals.³ The first category of municipal advisors is often referred to as non-solicitor municipal advisors, while the latter is sometimes referred to as solicitors.⁴

³ Section 15B(e)(4) of the Exchange Act (15 U.S.C. 78o-4(e)(4)) generally defines “municipal advisor” to mean a person (who is not a municipal entity or an employee of a municipal entity) that (i) provides advice to or on behalf of a municipal entity or obligated person with respect to municipal financial products or the issuance of municipal securities, including advice with respect to the structure, timing, terms, and other similar matters concerning such financial products or issues; or (ii) undertakes a solicitation of a municipal entity. Notwithstanding the omission of the term, “obligated person” in connection with the undertaking of a solicitation under Section 15B(e)(4)(A)(ii) of the Exchange Act (15 U.S.C. 78o-4(e)(4)(A)(ii)), the SEC has interpreted the definition of “municipal advisor” to include a person who engages in the solicitation of an obligated person acting in the capacity of an obligated person. See Release No. 34-70462 (September 20, 2013), 78 FR 67467, at notes 138 and 408 (November 12, 2013) (File No. S7-45-10) (“SEC Final MA Rule Adopting Release”). See also Exchange Act Rule 15Ba1-1(d)(1)(i) (17 CFR 240.15Ba1-1(d)(1)(i)).

⁴ Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78o-4(e)(9)) generally defines “solicitation of a municipal entity or obligated person” to mean a direct or indirect communication with a municipal entity or obligated person made by a person, for direct or indirect compensation, on behalf of a broker, dealer, municipal securities dealer, municipal advisor, or investment adviser . . . that does not control, is not controlled by, or is not under common control with the person undertaking such solicitation for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a broker, dealer, municipal securities dealer, or municipal advisor for or in connection with municipal financial products, the issuance of municipal securities, or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity. The SEC has interpreted this phrase generally in a manner similar to the statutory definition. However, it has also added two exceptions to the statutory definition for (i) advertising by a dealer, municipal advisor or investment adviser and (ii) solicitations of an obligated person where such obligated person is not acting in the capacity of an obligated person or the solicitation is not in connection with the issuance of municipal securities or with respect to municipal financial products. See Exchange Act Rule 15Ba1-1(n) (17 CFR 240.15Ba1-1(n)). Additionally, the SEC has exempted from the municipal advisor definition a person that undertakes a solicitation of a municipal entity or obligated person for the purpose of obtaining or retaining an engagement by a municipal entity or by an obligated person of a dealer or a municipal advisor for or in connection with municipal financial products that are investment strategies, to the extent such investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow

Proposed Rule G-46 would govern the conduct of these solicitors, more specifically defined as “solicitor municipal advisors” under Proposed Rule G-46(a)(vi).

While the Exchange Act⁵ permits a municipal advisor to conduct such solicitations on behalf of a third-party broker, dealer or municipal securities dealer (collectively and individually “dealers”),⁶ MSRB Rule G-38, on solicitation of municipal securities business, prohibits a dealer from providing or agreeing to provide payment to third parties for solicitations of municipal securities business made on behalf of the dealer.⁷ Additionally, as discussed in the MSRB’s Statement on Burden on Competition below, according to MSRB data, it appears that a substantial number of solicitations that would be subject to Proposed Rule G-46 involve a solicitation on behalf of a third-party investment adviser to provide investment advisory services to a municipal entity.

Anecdotally, the MSRB understands that such solicitations often occur in connection

investments. See Exchange Act Rule 15Ba1-1(d)(1) (17 CFR 240.15Ba1-1(d)(1)) and 15Ba1-1(d)(3)(viii) (17 CFR 240.15Ba1-1(d)(3)(viii)).

⁵ See Section 15B(e)(4) (15 U.S.C. 78o-4(e)(4)) and Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78o-4(e)(9)).

⁶ See 15 U.S.C. 78c(a)(4)(a) defining the term “broker” to mean “any person engaged in the business of effecting transactions in securities for the account of others;” see also 15 U.S.C. 78c (a)(5) defining the term “dealer” to mean “any person engaged in the business of buying and selling securities (not including security-based swaps, other than security-based swaps with or for persons that are not eligible contract participants) for such person’s own account through a broker or otherwise” and 15 U.S.C. 78c(a)(30) generally defining the term “municipal securities dealer” to mean any person (including a separately identifiable department or division of a bank) engaged in the business of buying and selling municipal securities for his own account, through a broker or otherwise, subject to certain exclusions.

⁷ The prohibition in Rule G-38 predates the regulation of municipal advisors.

with the solicitation of a public pension plan.⁸ For example, if a person communicates with a public pension plan for the purpose of getting a particular investment advisory firm hired by the plan to provide investment advisory services to such plan, that person may be a solicitor municipal advisor if such person is paid by the investment advisory firm for the communication and if such person and the investment advisory firm are not affiliated.

As discussed below, MSRB data suggests that the number of municipal advisors that engage in solicitations that may subject them to Proposed Rule G-46 comprise a relatively small percentage of the municipal advisors that are registered with the MSRB. However, notwithstanding the relatively small size of such solicitation market, the MSRB believes that it is important that the fundamental protections extended to the municipal entity and obligated person clients of other MSRB regulated entities are also extended to the municipal entities and obligated persons with whom solicitor municipal advisors interact. For example, as noted in the SEC Final MA Rule Adopting Release, the solicitation of public pension plans in connection with investment advisory services has been subject to multiple SEC enforcement actions.⁹ The MSRB believes that the proposed rule change would serve as an important bulwark against potential improper practices in the municipal market and also would provide greater certainty and transparency to solicitor municipal advisors regarding regulatory expectations.

⁸ See e.g., Third-Party Marketers Association: Letter from Donna DiMaria, Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee to the MSRB, dated June 16, 2021 (“3PM I”).

⁹ See SEC Final MA Rule Adopting Release, 78 FR at 67482.

From a practical perspective, any registered municipal advisor is permitted to act as both a solicitor municipal advisor and a non-solicitor municipal advisor. However, anecdotally, the MSRB understands that relatively few non-solicitor municipal advisors also act as solicitor municipal advisors.¹⁰ With respect to solicitations on behalf of third parties to provide investment advisory services, commenters have informed the MSRB that there are two ways in which a solicitor municipal advisor typically may solicit a municipal entity: (1) directly or (2) through an intermediary.¹¹ They are discussed below.

Direct Solicitations

A solicitor municipal advisor often first communicates with a staff member of the solicited entity (i.e., the municipal entity or obligated person) who handles investment manager research for the entity. This individual generally is responsible for evaluating the solicitor client's product/services to ensure they are appropriate for the entity given the entity's investment policy statement guidelines and restrictions. This first

¹⁰ According to MSRB data shown in Table 1 below, 69 municipal advisors indicated that they engage in both solicitation and non-solicitation municipal advisory activity. However, it is unclear the extent to which these municipal advisors actively engage in both types of activity.

¹¹ See e.g., "3PM I". While these comments pertained primarily to the solicitation of municipal entities, the MSRB does not have reason to believe that the practice of soliciting obligated persons, to the extent that such solicitations occur, would be substantially different. The MSRB notes that the intermediary itself may be a solicitor municipal advisor to the extent that the intermediary makes a communication with an unaffiliated municipal entity or obligated person, for compensation, on behalf of a third-party dealer, municipal advisor, or investment adviser for the purpose of obtaining or retaining an engagement by such municipal entity or obligated person of a dealer or municipal advisor for or in connection with municipal financial products or the issuance of municipal securities, or of an investment adviser to provide investment advisory services. See Section 15B(e)(9) of the Exchange Act (15 U.S.C. 78o-4(e)(9)).

communication potentially is one of many that may span years. Additionally, the solicitor municipal advisor's client likely will have its own communications with the solicited entity, which may include board presentations, meetings and discussions during which the solicitor municipal advisor may or may not be present.

Indirect Solicitations Through an Intermediary

A solicitor municipal advisor typically initially will solicit a financial intermediary or an investment consultant (collectively "intermediary") who is hired by the solicited entity to conduct searches and identify appropriate investment managers to meet a municipal entity's specific need.¹² Such intermediary itself may be a solicitor municipal advisor.¹³ When a solicitor municipal advisor first solicits the intermediary, the solicitor municipal advisor may not necessarily know who the intermediary represents (i.e., whether the intermediary represents municipal entities, obligated persons, other private entities, or all of the above). Additionally, the solicitor municipal advisor generally will not know whether the intermediary will recommend the solicitor municipal advisor's client to the intermediary's municipal entity client(s) (if any). As a result, at the time of the first solicitation, a solicitor municipal advisor may not know if it is indirectly soliciting a municipal entity. Moreover, the solicitor municipal advisor's client (e.g., the investment adviser) may engage in multiple subsequent communications with either the intermediary and/or the intermediary's client (e.g., the municipal entity or obligated person), during which the solicitor municipal advisor may or may not be present. In some

¹² In the most common scenario, an intermediary will be an investment consultant or will perform similar functions.

¹³ See supra note 11.

instances, the solicitor municipal advisor may never meet or directly communicate with an intermediary's municipal entity or obligated person client.

Proposed Rule G-46

Summary of Proposed Rule G-46

Proposed Rule G-46 would establish the core standards of conduct and duties of “solicitor municipal advisors” (as defined below) when engaging in solicitation activities that would require them to register with the SEC and the MSRB as municipal advisors. The proposed rule also would codify certain statements in an MSRB notice issued in 2017 pertaining to the application of MSRB rules to solicitor municipal advisors.¹⁴ Those statements relate to the obligation of solicitor municipal advisors under MSRB Rule G-17, on conduct of municipal securities and municipal advisory activities (the “G-17 Excerpt for Solicitor Municipal Advisors”).¹⁵ In addition to codifying much of the substance of the G-17 Excerpt for Solicitor Municipal Advisors, Proposed Rule G-46 also would add additional requirements that would better align some of the obligations imposed on solicitor municipal advisors with those applicable to: non-solicitor municipal advisors under Rule G-42, on duties of non-solicitor municipal advisors; underwriters under Rule G-17, on fair dealing, and; certain solicitations undertaken on behalf of third-party investment advisers under the SEC’s marketing rule for investment advisers (the

¹⁴ See MSRB Notice 2017-08, Application of MSRB Rules to Solicitor Municipal Advisors (May 4, 2017).

¹⁵ See *id.* at 17-18.

“IA Marketing Rule” or “IA Rule 206(4)-1”).¹⁶

In summary, the core provisions of Proposed Rule G-46 generally would:

- Set forth definitions for terms used in the proposed rule;
- Require solicitor municipal advisors to provide to their solicitor clients full and fair disclosure in writing of all of their material conflicts of interest and material legal or disciplinary events;
- Require solicitor municipal advisors to document their relationships in writing(s), deliver such writing(s) to their solicitor clients, and set forth certain minimum content that must be included in such writing(s);
- Prohibit solicitor municipal advisors from making a representation that the solicitor municipal advisor knows or should know is either materially false or misleading regarding the capacity, resources or knowledge of the solicitor client and require solicitor municipal advisors to have a reasonable basis for any material representations it makes to a solicited entity regarding the capacity, resources or knowledge of the solicitor client;
- Require solicitor municipal advisors to disclose to solicited entities material facts about the solicitation, including but not limited to an obligation to disclose:
 - Information about the solicitor municipal advisor’s role and compensation;
 - The solicitor municipal advisor’s material conflicts of interest;
 - Information regarding the solicitor client (i.e., the type of information that is generally on Form MA or Form ADV, Part 2 and a description of how

¹⁶ 17 CFR 275.206(4)-1.

the solicited entity can obtain a copy of the solicitor client's Form MA or Form ADV, Part 2, as applicable);

- Set forth a dual disclosure standard with respect to required disclosures to solicited entities:
 - Generally, disclosures would be required to be made in writing and delivered:
 - At the time of the first communication to a solicited entity (or in the case of an indirect solicitation, the first communication to an intermediary of the solicited entity) on behalf of a specific solicitor client; and
 - If the solicitation results in a solicited entity engaging a solicitor client for investment advisory services or municipal advisory services, again at the time that engagement documentation between the solicitor client and the solicited entity is delivered to the solicited entity or promptly thereafter. Such disclosures may be provided by either the solicitor client or the solicitor municipal advisor, but must be made to an official of the solicited entity that, among other things, the solicitor municipal advisor (or, the solicitor client if the solicitor client provides such disclosures) reasonably believes has the authority to bind the solicited entity by contract; and
- Expressly prohibit solicitor municipal advisors from: delivering an inaccurate invoice for fees or expenses and making payments for the purpose of obtaining or

retaining an engagement to perform municipal advisory activities subject to exceptions specified in the rule.

Supplementary material to Proposed Rule G-46 generally would:

- Provide additional explanation regarding the MSRB's expectations with respect to the reasonable basis a solicitor municipal advisor must have for certain of its representations;
- Explain the relationship between a solicitor municipal advisor's fair dealing obligations and a federal fiduciary duty for municipal advisors;
- Explain the relationship between a municipal advisor's obligations under Proposed Rule G-46 and Rule G-42; and
- Provide additional explanation applicable to a solicitor municipal advisor's obligation to document its compensation arrangement and make related disclosures.

Provided below is a more detailed description of Proposed Rule G-46.

Definitions

Proposed Rule G-46(a) would set forth a set of definitions for terms used in the rule. It would define the terms "compensation,"¹⁷ "excluded communications,"¹⁸

¹⁷ Proposed Rule G-46(a)(i) generally would provide that "compensation" means any cash, in-kind or non-cash remuneration, including but not limited to merchandise, gifts, travel expenses, meals and lodging.

¹⁸ Proposed Rule G-46(a)(ii) generally would provide that "excluded communications" means (A) advertising by a dealer, municipal advisor, or investment adviser; (B) direct or indirect communications with an obligated person if such obligated person is not acting in the capacity of an obligated person; (C) direct or indirect communications with an obligated person made for the purpose of obtaining or retaining an engagement that is not in connection with the issuance of municipal securities or with respect to municipal financial

“solicitation,” “solicited entity,” “solicitor client,” “solicitor municipal advisor,” and “solicitor relationship.”¹⁹ The most important of these definitions, which are integral to understanding nearly all of the provisions of Proposed Rule G-46 are discussed below.

Proposed Rule G-46(a)(iii) generally would define the term “solicitation” to mean a direct or indirect communication with a municipal entity or obligated person made by a solicitor municipal advisor, for direct or indirect compensation, on behalf of a municipal advisor or investment adviser that does not control, is not controlled by, or is not under common control with the solicitor municipal advisor for the purpose of obtaining or retaining an engagement by a municipal entity or obligated person of a municipal advisor for or in connection with municipal financial products or the issuance of municipal securities or of an investment adviser to provide investment advisory services to or on behalf of a municipal entity; provided, however, that it does not include excluded communications, as defined in Proposed Rule G-46(a)(ii). This definition is consistent

products; and (D) direct or indirect communications made for the purpose of obtaining or retaining an engagement for or in connection with municipal financial products that are investment strategies to the extent that those investment strategies are not plans or programs for the investment of the proceeds of municipal securities or the recommendation of and brokerage of municipal escrow investments. The term “excluded communications” is used in the term “solicitation,” which would be defined in Proposed Rule G-46(a)(iii).

¹⁹ Proposed Rule G-46(a)(vii) generally would provide that, for purposes of the rule, a “solicitor relationship” is deemed to exist when a municipal advisor enters into an agreement to undertake a solicitation of a municipal entity or obligated person within the meaning of Section 15B(e)(9) of the Act, 15 U.S.C. 78o-4(e)(9), and the rules and regulations thereunder. The solicitor relationship shall be deemed to have ended on the date which is the earlier of (i) the date on which the solicitor relationship has terminated pursuant to the terms of the documentation of the solicitor relationship required by Proposed Rule G-46(c) or (ii) the date on which the solicitor municipal advisor withdraws from the solicitor relationship.

with the defined term “solicitation of a municipal entity or obligated person” under Section 15B(e)(9) of the Exchange Act,²⁰ except to the extent that the term “solicitation” under Proposed Rule G-46(a)(iii) does not address solicitations undertaken on behalf of a third-party dealer. As noted above, MSRB Rule G-38 generally prohibits a dealer from providing or agreeing to provide payment to third parties for solicitations of municipal securities business made on behalf of the dealer. As a result, Proposed Rule G-46 assumes that such solicitations do not occur.

Proposed Rule G-46(a)(iv) generally would define the term “solicited entity” to mean any municipal entity or obligated person (as those terms are defined in Section 15B(e)(8) and (e)(10) of the Exchange Act²¹ and the rules and regulations thereunder) that the solicitor municipal advisor has solicited, is soliciting or intends to solicit within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act²² and the rules and regulations thereunder.

Proposed Rule G-46(a)(v) generally would define the term “solicitor client” to mean the municipal advisor or investment adviser on behalf of whom the solicitor municipal advisor undertakes a solicitation within the meaning of Sections 15B(e)(4)(A)(ii) and (e)(9) of the Act²³ and the rules and regulations thereunder. As noted above, because of the prohibition set forth in MSRB Rule G-38, Proposed Rule G-

²⁰ 15 U.S.C. 78o-4(e)(9).

²¹ 15 U.S.C. 78o-4(e)(8) and 15 U.S.C. 78o-4(e)(10).

²² 15 U.S.C. 78o-4(e)(4)(A)(ii) and 15 U.S.C. 78o-4(e)(9)).

²³ Id.

46 presumes that solicitors do not conduct paid solicitations on behalf of third-party dealers. As a result, the term “solicitor client” as defined in Proposed Rule G-46(a)(v) does not include dealers as solicitor clients.

Proposed Rule G-46(a)(vi) generally would define the term “solicitor municipal advisor” to mean, for purposes of the rule, a municipal advisor within the meaning of Section 15B(e)(4) of the Act²⁴ and other rules and regulations thereunder; provided, that it shall exclude a person that is otherwise a municipal advisor solely based on activities within the meaning of Section 15B(e)(4)(A)(i) of the Act²⁵ and the rules and regulations thereunder. Generally, this means that a solicitor municipal advisor is any municipal advisor that is not a non-solicitor municipal advisor.

Disclosure to Solicitor Clients

Proposed Rule G-46(b) would require a solicitor municipal advisor to provide to a client full and fair disclosure in writing of all material conflicts of interest and any legal or disciplinary event that would be material to a reasonable solicitor client’s evaluation of the solicitor municipal advisor or the integrity of its management or advisory personnel. The disclosures must be provided prior to or upon engaging in municipal advisory activities.

The proposed rule sets forth an alternative to providing a narrative description of any such legal or disciplinary events by permitting solicitor municipal advisors to reference such information in certain other publicly available information if the

²⁴ 15 U.S.C. 78o-4(e)(4).

²⁵ 15 U.S.C. 78o-4(e)(4)(A)(i).

conditions specified in the rule are met. As a result, solicitor municipal advisors that are also registered broker-dealers or investment advisers would be permitted to identify the specific type of event and make specific reference to the relevant portions of the solicitor municipal advisor's Form BD or Form ADV if the solicitor municipal advisor provides detailed information specifying where the client may electronically access such forms.²⁶ All other municipal advisors would be permitted to identify the specific type of event and make specific reference to the relevant portions of the solicitor municipal advisor's most recent Forms MA or MA-I filed with the Commission if the solicitor municipal advisor provides detailed information specifying where the client may electronically access such forms.²⁷

Documentation of the Solicitor Relationship

Proposed Rule G-46(c) would require a solicitor municipal advisor to evidence each of its solicitor relationships by a writing or writings created and delivered to the solicitor client prior to, upon or promptly after the establishment of the solicitor relationship. The writing(s) would be required to be dated and include, at a minimum:

- A description of the solicitation activities to be engaged in by the solicitor municipal advisor on behalf of the solicitor client (including the scope of the

²⁶ For example, a solicitor municipal advisor could direct a solicitor client to FINRA's BrokerCheck system or the Investment Adviser Public Disclosure website, as applicable; provided, that the direction is accompanied by information as to how to retrieve the firm's specific Form BD or Form ADV and specific reference to the relevant portions of the applicable form.

²⁷ For example, a solicitor municipal advisor could direct a solicitor client to the SEC's EDGAR system; provided, that the direction is accompanied by information as to how to retrieve the firm's specific form(s) and specific reference to the relevant portions of the applicable form(s).

agreed-upon activities and a statement that the scope of the solicitation is anticipated to include the solicitation of municipal entities and/or obligated persons);

- The terms and amount of the compensation to be received by the solicitor municipal advisor for such activities;
- The date, triggering event, or means for the termination of the relationship, or, if none, a statement that there is none; and
- Any terms relating to withdrawal from the relationship.

The proposed obligation to document the relationship is generally consistent with a non-solicitor municipal advisor's obligation to document its municipal advisory relationship with a client under Rule G-42(c).²⁸ The MSRB believes that this documentation obligation will help ensure that the solicitor client has certain basic material information about the engagement including the scope of agreed-upon activities and information pertaining to compensation for such activities. The MSRB also believes that this documentation obligation will assist examining authorities in understanding the solicitation arrangement and will provide them with necessary information to assist in evaluating a solicitor municipal advisor's compliance with relevant obligations.

The MSRB understands that a solicitor may be asked to solicit a broad range of entities on behalf of a client of the solicitor. These entities may include municipal

²⁸ Rule G-42(c) generally requires a municipal advisor to evidence each of its municipal advisory relationships by a writing or writings created and delivered to the municipal entity or obligated person client prior to, upon or promptly after the establishment of the municipal advisory relationship.

entities, obligated persons and corporate entities that are not obligated persons. While the solicitation of municipal entities and obligated persons generally would require compliance with Proposed Rule G-46 (to the extent the solicitation would make the solicitor a “municipal advisor”), the solicitation of an entity that is not a municipal entity or an obligated person would not require such compliance. In order to promote certainty as to the applicable regulatory scheme for any engagement, the MSRB believes that it is imperative for any engagement to be documented in a writing that clearly indicates whether the solicitation of municipal entities and/or obligated persons is anticipated. Information pertaining to termination of the relationship or withdrawal from the relationship will similarly assist both solicitor clients and examination and enforcement authorities in understanding the scope of an engagement.

Supplementary Material .04 would provide additional guidance with respect to the obligation to document the terms and the amount of compensation to be received. Specifically, it provides that the documentation(s) must clearly describe the structure of the compensation arrangement and the amount of compensation paid or to be paid. For example, a solicitor municipal advisor that will be paid on the basis of a flat or fixed fee would be required to disclose the amount of the flat fee, if known and/or calculable at the time of the documentation. If the precise dollar amount is not known at the time, the documentation should disclose how such compensation will be calculated. As another example, if the compensation arrangement calls for a percentage of fees collected from the referred clients, then the documentation should state so and describe what that percentage is.

Representations to Solicited Entities

Proposed Rule G-46(d)(i) expressly would prohibit a solicitor municipal advisor from making a representation that the solicitor municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the solicitor client. This prohibition is similar to a prohibition applicable to non-solicitor municipal advisors under Rule G-42 except that, unlike with Rule G-42, the prohibition for solicitor municipal advisors would not be limited to representations that occur in response to requests for proposals or qualifications or in oral presentations to a client or prospective client for the purpose of obtaining or retaining an engagement for the solicitor client.²⁹ This is because the MSRB believes that all of the solicitor municipal advisor's communications regarding the capacity, resources or knowledge of the solicitor's clients are expected to be for the purpose of obtaining or retaining an engagement for their clients.

Proposed Rule G-46(d)(ii) would require a solicitor municipal advisor to have a reasonable basis for any material representations it makes to a solicited entity regarding the capacity, resources or knowledge of the solicitor client. The MSRB believes that solicited entities should be entitled to rely on the material representations made by solicitor municipal advisors, as regulated financial professionals hired for the purpose of soliciting business on behalf of their clients, with respect to the qualifications of their

²⁹ See Rule G-42(e)(i)(C) which prohibits non-solicitor municipal advisors from making any representation or the submission of any information that the municipal advisor knows or should know is either materially false or materially misleading due to the omission of a material fact about the capacity, resources or knowledge of the municipal advisor, in response to requests for proposals or qualifications or in oral presentations to a client or prospective client, for the purpose of obtaining or retaining an engagement to perform municipal advisory activities.

clients. The MSRB further believes that such representations should have some reasonable basis.³⁰

Supplementary Material .01 would provide guidance on compliance with the reasonable-basis standard. Specifically, this supplementary material would state that while a solicitor municipal advisor must have a reasonable basis for the representations described in Proposed Rule G-46(d), the solicitor municipal advisor is not required to actively seek out every piece of information that may be relevant to such representations. It further provides an example to help illustrate this point.

Disclosures to Solicited Entities

Proposed Rule G-46(e) would require a solicitor municipal advisor to disclose to any solicited entity all material facts about the solicitation in the manner specified in section (f) of the proposed rule. This would include an obligation to disclose certain information pertaining to the solicitor municipal advisor's: (i) role and compensation; (ii) conflicts of interest; and (iii) client.

Role and Compensation Disclosures. Proposed Rule G-46(e)(i) would require a solicitor municipal advisor to disclose to any solicited entity:

- The solicitor municipal advisor's name;
- The solicitor client's name;

³⁰ The MSRB notes that this obligation bears some analogy to a non-solicitor municipal advisor's duty of care obligation to have a reasonable basis for any advice provided to or on behalf of a client pursuant to Rule G-42, Supplementary Material .01. While a non-solicitor municipal advisor provides advice to or on behalf of its municipal entity and obligated person clients, a solicitor municipal advisor solicits municipal entities and obligated persons on behalf of its clients. In both cases, the municipal advisor would be required to have a reasonable basis for what are likely to be the core material statements the municipal advisor was hired to provide to municipal entities and obligated persons.

- The type of business being solicited (i.e., municipal advisory business or investment advisory services);
- The material terms of the solicitor municipal advisor's compensation arrangement, including a description of the compensation provided or to be provided, directly or indirectly, to the solicitor municipal advisor for such solicitation; and
- Payments made by the solicitor municipal advisor to another solicitor municipal advisor to facilitate the solicitation.

Supplementary Material .04 would provide additional guidance with respect to the obligation to disclose the material terms of the solicitor municipal advisor's compensation arrangement. Specifically, it would provide that Proposed Rule G-46(e)(i)(D) would require disclosure of at least the same information as that required by Proposed Rule G-46(c)(ii), to the extent material. However, Proposed Rule G-46(e)(i)(D) also may require the disclosure of additional information, depending on the facts and circumstances. For example, if the solicitor municipal advisor receives indirect compensation for the solicitation, information pertaining to the indirect compensation also must be disclosed.

Additionally, the solicitor municipal advisor would be required to disclose the following statements:

- In connection with its solicitation activities as a municipal advisor, a solicitor municipal advisor does not owe a fiduciary duty under Section 15B(c)(i) of the Exchange Act or MSRB rules to the entities that it solicits and is not required by those provisions to act in the best interests of such entities without regard to the

solicitor municipal advisor's own financial or other interests. However, in connection with such solicitation activities, a solicitor municipal advisor is required to deal fairly with all persons, including both solicited entities and the solicitor municipal advisor's clients; and

- A solicitor municipal advisor's primary role is to solicit the solicited entity on behalf of certain third-party regulated entities and the solicitor municipal advisor will be compensated for its solicitation services by the solicitor municipal advisor's client.³¹

These statements draw from analogous disclosures that underwriters must make to their issuer clients pursuant to Rule G-17³² but are tailored to reflect the existence of a federal fiduciary duty for non-solicitor municipal advisors and to make clear that a solicitor municipal advisor's fair dealing obligations apply in connection with its solicitation activities.³³

³¹ While the proposed rule text uses the defined term "solicitor municipal advisor," to facilitate a more plain-language disclosure, the MSRB expects that solicitor municipal advisors would insert their name in place of the term "solicitor municipal advisor."

³² These disclosures include an obligation to disclose that: Rule G-17 requires an underwriter to deal fairly at all times with both issuers and investors; unlike a municipal advisor, the underwriter does not have a fiduciary duty to the issuer under the federal securities laws and is, therefore, not required by federal law to act in the best interests of the issuer without regard to its own financial or other interests; and the underwriter's primary role is to purchase securities with a view to distribution in an arm's-length commercial transaction with the issuer and it has financial and other interests that differ from those of the issuer. *See* MSRB Interpretive Notice Concerning the Application of MSRB Rule G-17 to Underwriters of Municipal Securities (March 31, 2021) (the "G-17 Underwriter's Guidance").

³³ *See* SEC MA Final Rule Adopting Release, 78 FR 67467 at note 100 (stating that "...the fiduciary duty of a municipal advisor, as set forth in Exchange Act Section

Supplementary Material .02 would expound on the relationship between Proposed Rule G-46 and the fair dealing obligation under Rule G-17 and includes similar discussion regarding application of the federal fiduciary duty to a solicitor municipal advisor's solicitations of solicited entities. However, it specifies that solicitor municipal advisors may be subject to fiduciary or other duties under state or other laws and that nothing in Proposed Rule G-46 shall be deemed to supersede any more restrictive provision of state or other laws applicable to municipal advisory activities. Finally, Supplementary Material .02 includes a cross reference to Supplementary Material .03 and would remind solicitor municipal advisors that, to the extent they also engage in non-solicitor municipal advisory activity, the requirements of Rule G-42 will apply with respect to such activity and a federal fiduciary duty will apply with respect to the municipal entity clients of the municipal advisor.

Conflicts Disclosures. Proposed Rule G-46(e)(ii) would require a solicitor municipal advisor to disclose any material conflicts of interest,³⁴ including but not limited

15B(c)(1), extends only to its municipal entity clients") (emphasis added); see also text accompanying note 100 (stating that "...the Exchange Act, as amended by the Dodd-Frank Act, grants the MSRB regulatory authority over municipal advisors and imposes a fiduciary duty on municipal advisors when advising municipal entities") (emphasis added); Exchange Act Section 15B(b)(2)(L)(i) (15 U.S.C. 78o-4(b)(2)(L)(i)) (granting the MSRB authority to "prescribe means reasonably designed to prevent acts, practices, and courses of business as are not consistent with a municipal advisor's fiduciary duty to its clients") (emphasis added). Because a solicitor municipal advisor's clients are not the municipal entities that they solicit, but rather the third parties that retain or engage the solicitor municipal advisor to solicit such municipal entities, solicitor municipal advisors do not owe a fiduciary duty under the Exchange Act or MSRB rules to their clients (or the municipal entity) in connection with such activity. See MSRB Notice 2017-08, at 10.

³⁴ If a reasonable solicited entity would consider a particular conflict of interest on the part of the solicitor municipal advisor to be material to the decision to choose

to the fact that, because the solicitor municipal advisor is compensated for its solicitation efforts, it has an incentive to recommend its clients, resulting in a material conflict of interest. The solicitor municipal advisor also would be required to disclose any material conflicts of interest, of which the solicitor municipal advisor is aware after reasonable inquiry, that could reasonably be anticipated to impair the solicitor municipal advisor's ability to solicit the solicited entity in accordance with its duty of fair dealing. This obligation is comparable to a non-solicitor municipal advisor's obligation under Rule G-42 to disclose to its clients all material conflicts of interest, including any conflicts, of which the municipal advisor is aware after reasonable inquiry, that could reasonably be anticipated to impair the municipal advisor's ability to provide advice to or on behalf of the client in accordance with the standards set forth in the rule.³⁵ It also is comparable to the obligation under the IA Marketing Rule to disclose that a promoter, due to the fact that it is compensated, has an incentive to recommend the investment adviser it promotes, resulting in a material conflict of interest.³⁶ The MSRB believes that disclosure of such conflict-of-interest information is key to assisting a solicited entity in evaluating the solicitor municipal advisor's statements and in determining whether to retain the solicitor's client. For example, without a specific disclosure about a solicitor municipal advisor's incentives, a solicitation creates a risk that the solicited entity would mistakenly

the solicitor municipal advisor's client, then such conflict of interest should be disclosed.

³⁵ See Rule G-42(b)(i)(F).

³⁶ See Investment Adviser Marketing, Release No. IA-5653 at 101 (Dec. 22, 2020), 86 FR 13024 (March 5, 2021) available at: <https://www.federalregister.gov/d/2020-28868/p-618>.

view the solicitor municipal advisor's recommendation as being an unbiased opinion about the solicitor client's ability to, for example, manage the solicited entity's assets, and would rely on that recommendation more than the solicited entity otherwise would if the solicited entity knew of the solicitor municipal advisor's incentive.

Solicitor Client Disclosures. Proposed Rule G-46(e)(iii) would require a solicitor municipal advisor to provide to the solicited entity the following information regarding the solicitor client:

- The type of information that is generally available on Form MA (in the case of a municipal advisor client) or Form ADV, Part 2 (in the case of an investment adviser client); and
- A description of how the solicited entity can obtain a copy of the solicitor client's Form MA or Form ADV, Part 2, as applicable.

These requirements are designed to help ensure that, at any early stage, solicited entities are directed to important written information about the entities the solicitor municipal advisor represents—including, but not limited to, information about the disciplinary history of the solicitor municipal advisor's clients. However, it does not require solicitor municipal advisors to obtain a copy of these documents and provide them to their solicited entities, nor does it require a solicitor municipal advisor to disclose any specific information about the client that is included in such forms.³⁷

³⁷ However, solicitor municipal advisors should be mindful of their general fair dealing obligations under Rule G-17 and of their obligations related to certain of their representations under Proposed Rule G-46(d). If a solicitor municipal advisor were to make a representation regarding the capacity, resources or knowledge of the solicitor's client that the solicitor municipal advisor knows or should know is inaccurate based on a review of its client's Form MA or Form

Timing and Manner of Disclosures to Solicited Entities

Proposed Rule G-46(f) would provide that any disclosures required under section (e) of the proposed rule (pertaining to disclosures to solicited entities) must be made in writing. The proposed rule also would provide for a dual-disclosure requirement, such that solicitations that result in a solicited entity engaging a solicitor client would receive the requisite disclosures twice. Specifically, they would receive the disclosures once at the time of the first communication giving rise to the solicitation and again at the time that engagement documentation pertaining to the solicited entity's engagement of the solicitor client is delivered (or promptly thereafter).

Initial Disclosure at the Time of the First Communication. The disclosures would be required to be delivered at the time of the first communication (as that term is used in the definition of "solicitation") with a solicited entity on behalf of a specific solicitor client.³⁸ Specifically, the disclosures would be required to be provided to the solicitor client representative with whom such communication is made. In the case of an indirect solicitation—a solicitation of an intermediary who represents a municipal entity or obligated person—the disclosures must be provided to the intermediary with whom such

ADV, that solicitor municipal advisor could be in violation of Proposed Rule G-46.

³⁸ A solicitor municipal advisor would be expected to provide separate disclosures for each of its engagements. For example, assume that a solicitor municipal advisor solicits a municipal entity on behalf of a municipal advisor client to provide municipal advisory services to the municipal entity. One week later, the solicitor municipal advisor solicits the municipal entity again—this time to obtain an engagement for the solicitor municipal advisor's investment advisory client to provide investment advisory services to the municipal entity. The solicitor municipal advisor would be expected to provide its disclosures to the municipal entity again in connection with the second solicitation.

communication is made.³⁹

Second Disclosure at the Time of the Solicitor Client's Engagement with the Solicited Entity. If the solicitation results in a solicited entity engaging a solicitor client for investment advisory services or municipal advisory services, all disclosures required by Proposed Rule G-46(e) would be required to be provided at the time that such engagement documentation is delivered to the solicited entity or promptly thereafter. This is the case even if there are no changes between the initial set of disclosures and the second set of disclosures.

The second set of disclosures may be provided by either the solicitor client or the solicitor municipal advisor. The MSRB believes that this flexibility would permit, for example, a solicitor municipal advisor's investment adviser client to provide the solicitor's disclosures to the solicited entity at the time that the investment adviser enters into an engagement with the solicited entity.⁴⁰ These disclosures would be required to be made to an official of the solicited entity that: (1) the solicitor municipal advisor (or, the

³⁹ For example, a solicitor municipal advisor presentation to an investment consultant hired by a public pension plan may be an indirect solicitation of that public pension plan. In such a case, the disclosure would be provided to the investment consultant.

⁴⁰ The MSRB does not propose to require the engagement documentation between the solicitor municipal advisor and its solicitor clients to include an affirmative undertaking on the part of the solicitor client to provide the solicitor's disclosures to a solicited entity. However, a solicitor municipal advisor might seek the inclusion of such language in its engagement documentation as one means of seeking to comply with Proposed Rule G-46. As one additional alternative, a solicitor municipal advisor might seek to include in its engagement documentation with its solicitor clients a requirement that the solicitor client provide to the solicitor municipal advisor prompt notice that the solicitor client has been engaged by the solicited entity. Proposed Rule G-46 would provide solicitor municipal advisors flexibility in determining how to deliver the second set of disclosures.

solicitor client, if the solicitor client provides such disclosures) reasonably believes has the authority to bind the solicited entity by contract;⁴¹ and (2) is not a party to a disclosed conflict.⁴² These two conditions would not apply to the initial delivery of disclosures.

The MSRB believes that this dual or bifurcated approach would help ensure that the person that is initially solicited receives this key information in time to consider it in connection with the initial solicitation. However, because such person(s) may not have the authority to bind the solicited entity by contract (particularly where such person is an intermediary between the solicitor and the solicited entity), the MSRB would require that the disclosures are provided again at the time of the engagement between the solicited entity and the solicitor client (or promptly thereafter). The MSRB believes that any risk associated with the first disclosures not being passed on to a knowledgeable person with the authority to bind the solicited entity in contract would be mitigated by requiring that the disclosures are provided again at the time of the engagement—this time, to someone who does have such authority. Additionally, the MSRB understands that solicitations

⁴¹ Solicitor municipal advisors would be expected to adopt reasonable policies and procedures to support the reasonable belief that the solicited entity representative has the authority to bind the solicited entity. However, consistent with the flexible approach to supervision under Rule G-44, on supervisory and compliance obligations of municipal advisors, the reasonable policies and procedures of one firm may reasonably differ from that of another's. As one example only, solicitor municipal advisors could seek to incorporate into their written agreements with their solicitor clients a condition that such disclosures provided on behalf of the solicitor municipal advisor must be provided to a solicited entity representative that the solicitor client reasonably believes has the authority to bind the solicited entity.

⁴² To the extent a solicitor municipal advisor relies on its client to pass on its second set of disclosures, the solicitor municipal advisor may wish to provide its clients with a list of persons associated with the solicited entity who are a party to a conflict to help ensure that the solicitor client does not pass on the disclosures to such persons.

may sometimes span years. Particularly in such instances, the MSRB believes that it is important that the solicited entity receives the disclosures again at the time of the solicitor client's engagement with the solicited entity.

Specified Prohibitions

Proposed Rule G-46(g) expressly would prohibit a solicitor municipal advisor from:

- Delivering an invoice for fees or expenses for municipal advisory activities that is materially inaccurate in its reflection of the activities actually performed or the personnel that actually performed those activities; and
- Making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities, subject to three specified exceptions discussed further below.

Exceptions for Payments to Obtain or Retain an Engagement. Solicitor municipal advisors would be prohibited from making payments for the purpose of obtaining or retaining an engagement to perform municipal advisory activities other than:

- Payments to an affiliate for a direct or indirect communication with a municipal entity or obligated person on behalf of the solicitor municipal advisor where such communication is made for the purpose of obtaining or retaining an engagement to perform municipal advisory activities;
- Reasonable fees paid to another municipal advisor registered as such with the Commission and the MSRB for making a communication for the purpose of obtaining or retaining an engagement to perform municipal advisory activities; and

- Payments that are permissible “normal business dealings” as described in Rule G-20, on gifts, gratuities, non-cash compensation and expenses of issuance.

These specified prohibitions are modeled on similar prohibitions applicable to non-solicitors under MSRB Rule G-42(e)(i) and to a lesser degree would align with certain prohibitions applicable to underwriters under the G-17 Underwriter’s Guidance.⁴³

Supplementary Material

Proposed Rule G-46 would set forth four supplementary material sections:

- Providing additional explanation regarding the MSRB’s expectations with respect to the reasonable basis a solicitor municipal advisor must have for the representations described in Proposed Rule G-46(d);⁴⁴
- Explaining the relationship between a solicitor municipal advisor’s fair dealing obligations and the applicability of a federal fiduciary duty for municipal advisors;⁴⁵
- Explaining the relationship between a municipal advisor’s obligations under Proposed Rule G-46 and Rule G-42; and
- Providing additional detail regarding a solicitor municipal advisor’s compensation documentation and disclosure obligations.⁴⁶

⁴³ See Rule G-42(e)(i); see also G-17 Underwriter’s Guidance at section titled, “Underwriter Compensation and New Issue Pricing.”

⁴⁴ See supra discussion titled “Representations to Solicited Entities.”

⁴⁵ See supra discussion titled “Disclosures to Solicited Entities.”

⁴⁶ See supra discussion titled “Documentation of the Solicitor Relationship” and “Disclosures to Solicited Entities.”

Supplementary Material .03 explains that municipal advisors should be mindful that one may be, simultaneously, both a solicitor municipal advisor for purposes of Proposed Rule G-46 and a non-solicitor municipal advisor for purposes of Rule G-42. For example, a municipal advisor may provide “advice” as defined in Rule G-42 to a municipal entity (the “advisory engagement”) and separately may act as a solicitor municipal advisor with respect to that same municipal entity or another municipal entity as contemplated in Proposed Rule G-46 (the “solicitor municipal advisor engagement”). As a result, the municipal advisor would be subject to Rule G-42 with respect to the advisory engagement and would be subject to Proposed Rule G-46 with respect to the solicitor municipal advisor engagement. Municipal advisors should evaluate the activity undertaken with respect to each engagement to determine which rule governs and ensure the written supervisory procedures required under Rule G-44 reflect such.

Proposed Amendments to MSRB Rule G-8

Proposed amendments to Rule G-8 would add specific recordkeeping obligations designed to help facilitate and document compliance with Proposed Rule G-46. Specifically, they would add new subsection (viii)⁴⁷ requiring solicitor municipal advisors to make and keep the following books and records:

- Evidence that the disclosures required by Proposed Rule G-46(b) were made in the manner required by that section;
- A copy of each writing or writings required by Proposed Rule G-46(c);
- Documentation substantiating the solicitor municipal advisor’s reasonable basis

⁴⁷ Today the MSRB also filed a proposed rule change to amend MSRB Rule G-40, on advertising by municipal advisors, and amend MSRB Rule G-8 by adding subparagraph (h)(viii) to the rule.

for believing its representations as described in Proposed Rule G-46(d) (e.g., a checklist confirming that an investment adviser client's Form ADV was reviewed); and

- Evidence that the disclosures required by Proposed Rule G-46(e) were made in the manner described in Proposed Rule G-46(f) (e.g., automatic email delivery receipt).

2. Statutory Basis

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2) of the Exchange Act,⁴⁸ which provides that the Board shall propose and adopt rules to effect the purposes of this title with respect to transactions in municipal securities effected by brokers, dealers, and municipal securities dealers and advice provided to or on behalf of municipal entities or obligated persons by brokers, dealers, municipal securities dealers, and municipal advisors with respect to municipal financial products, the issuance of municipal securities, and solicitations of municipal entities or obligated persons undertaken by brokers, dealers, municipal securities dealers, and municipal advisors.

Section 15B(b)(2)(C) of the Exchange Act⁴⁹ provides that the MSRB's rules shall be designed to prevent fraudulent and manipulative acts and practices, to promote just

⁴⁸ 15 U.S.C. 78o-4(b)(2).

⁴⁹ 15 U.S.C. 78o-4(b)(2)(C).

and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities and municipal financial products, to remove impediments to and perfect the mechanism of a free and open market in municipal securities and municipal financial products, and, in general, to protect investors, municipal entities, obligated persons, and the public interest.

Prevention of Fraudulent and Manipulative Acts and Practices

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act⁵⁰ because the proposed rule change would help prevent fraudulent and manipulative acts and practices. It would do so by expressly prohibiting solicitor municipal advisors from making a representation that the solicitor municipal advisor knows or should know is either materially false or misleading regarding the capacity, resources or knowledge of the solicitor client. It also would require solicitor municipal advisors to have a reasonable basis for any material representations the solicitor municipal advisor makes to a solicited entity regarding the capacity, resources or knowledge of the solicitor client. The proposed rule change also expressly would prohibit solicitor municipal advisors from delivering an inaccurate invoice for fees or expenses. The MSRB believes that the express prohibition of such conduct—all of which could be forms of fraudulent and manipulative acts and practices themselves—would help prevent fraudulent and manipulative acts and practices. Finally, the proposed rule change would provide that solicitor municipal advisors would be prohibited from making payments for the purpose of obtaining or retaining an

⁵⁰ Id.

engagement to perform municipal advisory activities subject to specified exceptions. Among other things, this would effectively require solicitor municipal advisors to use only associated persons or other regulated solicitor municipal advisors to obtain business on their behalf. This would help ensure that only regulated persons—who are subject to rules designed to prevent fraudulent and manipulative acts and practices—may engage in solicitation activities on behalf of a solicitor municipal advisor.

Fostering Cooperation and Coordination

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act⁵¹ because it would foster cooperation and coordination with persons engaged in regulating transactions in municipal securities and municipal financial products. It would do so by requiring solicitor municipal advisors to document their relationships in writing that includes certain minimum content that is vital to the solicitor municipal advisor, its clients and applicable regulators in understanding the material terms of an engagement—including the scope of agreed-upon activities, information pertaining to compensation for such activities and whether the solicitation of municipal entities and/or obligated persons is anticipated. This documentation obligation would help promote certainty as to the applicable regulatory scheme for any engagement since only solicitations of municipal entities and obligated persons would be subject to Proposed Rule G-46, whereas other solicitations may fall within the jurisdiction of the rules of other regulators (e.g., the Commission or the Financial Industry Regulatory Authority). The MSRB believes that this documentation obligation (and related books

⁵¹ 15 U.S.C. 78o-4(b)(2)(C).

and records obligations stemming from the proposed amendments to Rule G-8) would assist examining authorities in understanding the solicitation arrangement and would provide them with necessary information to assist in evaluating a solicitor municipal advisor's compliance with relevant obligations. The MSRB further believes that the proposed amendments to Rule G-8 (with the ensuing application of existing Rule G-9 on records preservation) would help create an audit trail to assist examination and enforcement authorities in their examination for compliance with these prohibitions, fostering cooperation and coordination between regulatory authorities.

Protection of Municipal Entities, Obligated Persons, and the Public Interest

The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(C) of the Exchange Act⁵² because it would protect municipal entities, obligated persons, and the public interest. It would do so by requiring solicitor municipal advisors to disclose in writing all of their material conflicts of interest and material legal or disciplinary events to the entities that determine whether to hire such solicitor municipal advisors. The MSRB believes that this requirement would increase solicitor municipal advisor accountability and discourage conduct inconsistent with a solicitor municipal advisor's obligations because such conduct would be required to be disclosed in information provided to clients, thereby incentivizing firms to refrain from such conduct or risk not retaining an engagement. The MSRB also believes that such requirement would simultaneously provide prospective clients with valuable information that is directly relevant to their solicitor municipal advisor hiring decisions.

⁵² 15 U.S.C. 78o-4(b)(2)(C).

The proposed rule change also would protect municipal entities and obligated persons by better aligning the obligations owed by solicitor municipal advisors to their clients with those applicable to non-solicitor municipal advisors to their clients under Rule G-42. Like non-solicitor municipal advisors, solicitor municipal advisors would be required to: disclose their material conflicts of interest;⁵³ document their relationships in writing;⁵⁴ and refrain from certain conduct such as making certain materially false or misleading representations,⁵⁵ delivering a materially inaccurate invoice,⁵⁶ and making certain payments for the purpose of obtaining or retaining an engagement.⁵⁷ These Rule G-42 provisions protect municipal entities by assisting non-solicitor municipal advisors in complying with, or helping prevent breaches of, applicable obligations such as the duty of fair dealing, which is owed under Rule G-17 by all municipal advisors to all persons. These protections also would be provided to municipal entities and obligated persons solicited by solicitor municipal advisors. Additionally, as municipal advisors are permitted to engage in both solicitor municipal advisor activity and non-solicitor municipal advisor activity, the MSRB believes that the promotion of consistent standards among these municipal advisors, where applicable, is appropriate since the municipal entities and obligated persons solicited by solicitor municipal advisors and the municipal entity and obligated person clients of non-solicitor municipal advisors may reasonably

⁵³ See Rule G-42(b)(i)(F).

⁵⁴ See Rule G-42(c) and Proposed Rule G-46(c).

⁵⁵ See Rule G-42(e)(i)(C) and Proposed Rule G-46(d)(i).

⁵⁶ See Rule G-42(e)(i)(B) and Proposed Rule G-46(g)(i).

⁵⁷ See Rule G-42(e)(i)(E) and Proposed Rule G-46(g)(ii).

expect a certain baseline level of conduct from all municipal advisors. More specifically, the MSRB believes that the proposed rule change would protect municipal entities and obligated persons by requiring solicitor municipal advisors to disclose to solicited entities all material facts about the solicitation including certain information pertaining to the solicitor municipal advisor's: (i) role and compensation; (ii) conflicts of interest; and (iii) client. The MSRB believes that the role disclosures would help ensure that solicited entities (which are municipal entities and obligated persons) understand the role of a solicitor municipal advisor. The MSRB also believes that such disclosures would help to clarify potential confusion about the difference between a solicitor municipal advisor and other municipal advisors since they owe very different obligations to municipal entities. The proposed compensation disclosures are designed to help ensure that solicited entities have important information about how a solicitor municipal advisor is compensated to help inform the solicited entity's analysis of the nature and extent of a solicitor municipal advisor's incentive to recommend that a solicited entity hire a specific solicitor client. Finally, the MSRB believes that disclosure related to the solicitor municipal advisor's client would protect municipal entities, obligated persons and the public interest by ensuring that—at any early stage— solicited entities are directed to disclosures about the entities the solicitor municipal advisor represents including, but not limited to, information about the disciplinary history of the solicitor municipal advisor's clients.

Section 15B(b)(2)(L)(iv) of the Exchange Act⁵⁸ requires that rules adopted by the Board not impose a regulatory burden on small municipal advisors that is not necessary

⁵⁸ 15 U.S.C. 78o-4(b)(2)(L)(iv).

or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud. The MSRB believes that the proposed rule change is consistent with Section 15B(b)(2)(L)(iv) of the Exchange Act⁵⁹ because the proposed rule change would impose on all municipal advisors, including small municipal advisors, only the necessary and appropriate regulatory burdens needed to promote compliance with the proposed rule change. The proposed rule change represents a balanced approach to prescriptive standards with flexibility for large and small municipal advisors alike. For example, the MSRB believes that the flexibility to provide certain disclosures to a solicited entity via a third party (i.e., the solicitor's client) could be particularly helpful for small municipal advisors who may be less likely to be involved in subsequent communications with a solicited entity and, therefore, may need to rely on their clients to pass along certain disclosures at the time of the solicitor client's engagement. Finally, the MSRB seeks to harmonize standards, where appropriate, among those applicable to solicitor municipal advisors, non-solicitor municipal advisors and Commission-registered investment advisers such that those that engage in conduct that would make them two or more of the above could leverage some of the existing processes to comply with relevant obligations under a comparable regime. The MSRB believes that this will minimize the regulatory burden on all solicitor municipal advisors, including small municipal advisors.

The MSRB also believes that the proposed rule change is consistent with Section 15B(b)(2)(G) of the Exchange Act,⁶⁰ which provides that the MSRB's rules shall

⁵⁹ Id.

⁶⁰ 15 U.S.C. 78o-4(b)(2)(G).

prescribe records to be made and kept by municipal securities brokers, municipal securities dealers, and municipal advisors and the periods for which such records shall be preserved. The proposed rule change would require solicitor municipal advisors to make and keep current evidence that the disclosures required by Proposed Rule G-46 were made in the manner required by the proposed rule change, a copy of the writing(s) documenting the relationship, and documentation substantiating the solicitor municipal advisor's reasonable basis belief regarding its representations. The MSRB believes that the proposed amendments to Rule G-8 related to recordkeeping (with the ensuing application of existing Rule G-9 on records preservation) would promote compliance and facilitate enforcement of Proposed Rule G-46, other MSRB rules, and other applicable securities laws and regulations.

B. Self-Regulatory Organization's Statement on Burden on Competition

Section 15B(b)(2)(C) of the Act⁶¹ requires that MSRB rules not be designed to impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The MSRB believes that Proposed Rule G-46 on the duties of solicitor municipal advisors and Proposed Amended Rule G-8 on recordkeeping obligations would not impose any new burden on competition and, in fact, may relieve a burden on competition. The MSRB considered the economic impact associated with the proposed rule change, including a comparison to reasonable alternative regulatory approaches, relative to the baseline.⁶² The MSRB believes that the proposed rule change

⁶¹ 15 U.S.C. 78o-4(b)(2)(C).

⁶² See Policy on the Use of Economic Analysis in MSRB Rulemaking, available at <http://msrb.org/Rules-and-Interpretations/Economic-Analysis-Policy.aspx>. In evaluating whether there was a burden on competition, the Board was guided by

would not place a burden on competition as it would apply a regulatory regime to all solicitor municipal advisors similar to the regime that currently exists for non-solicitor municipal advisors under Rule G-42 and Rule G-8 on recordkeeping, and for underwriters under the Rule G-17 Underwriter's Guidance. Additionally, it would promote clearer regulatory requirements and expectations, enhancing the transparency and protection for recipients of solicitations and ensuring fair dealings between the market participants.

Furthermore, Section 15B(b)(2)(L)(iv) of the Act⁶³ provides that MSRB rules may not impose a regulatory burden on small municipal advisors that is not necessary or appropriate in the public interest and for the protection of investors, municipal entities, and obligated persons, provided that there is robust protection of investors against fraud. The MSRB believes the proposed rule change would apply equally to all solicitor municipal advisors, and on an ongoing year-by-year basis, the additional regulatory burden imposed would be proportional to each solicitor municipal advisory firm's size and business activities and hence would not affect competition. Therefore, the MSRB believes the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The purpose of amending Rule G-8 and proposing Proposed Rule G-46 would be to codify certain statements on the obligations of solicitor municipal advisors currently outlined in the G-17 Excerpt for Solicitor Municipal Advisors. Further, Proposed Rule G-

its principles that required the Board to consider costs and benefits of a rule change, its impact on capital formation and the main reasonable alternative regulatory approach.

⁶³ 15 U.S.C. 78o-4(b)(2)(L)(iv).

46 would better align the duty and obligations of solicitor municipal advisors with those for underwriters under Rule G-17, for non-solicitor municipal advisors under Rule G-42, and for solicitors that undertake certain solicitations on behalf of investment advisers under the SEC's investment adviser regime.

The core standards applicable to non-solicitor municipal advisors and underwriters under MSRB Rule G-42 and Rule G-17 are highlighted in a standalone rule for non-solicitor municipal advisors and a standalone interpretation that was filed with and approved by the SEC, respectively. In contrast, the G-17 Excerpt for Solicitor Municipal Advisors was issued in a notice that largely summarized existing rules and obligations applicable to solicitor municipal advisors and the standards set forth in the G-17 Excerpt for Solicitor Municipal Advisors were not as robust as the standards set forth in the proposed rule change. The proposed rule change is intended to enhance the consistency of regulatory standards and should therefore remove burdens to competition by providing clear expectations for all solicitor municipal advisors.

In conjunction with Proposed Rule G-46, the proposed amendments to Rule G-8 would add specific language relating to solicitor municipal advisors, which would facilitate recordkeeping compliance associated with Proposed Rule G-46 and help ensure solicitor municipal advisor accountability.

In contrast to the regulation of underwriters and non-solicitor municipal advisors, the MSRB currently does not have any explicit standards regarding documentation of a solicitor municipal advisor's engagement. Nor does it have express standards regarding solicitor municipal advisor disclosures of conflicts of interest. The MSRB believes that a Proposed Amended Rule G-8 and a codified Proposed Rule G-46 would result in

informed, clearer regulatory standards and expectations for all solicitor municipal advisors, which would not impose a burden on competition because the rule would apply to all solicitor municipal advisors equally. In addition, Proposed Amended Rule G-8 and Proposed Rule G-46 would better align the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G-42, underwriters under the G-17 Underwriter's Guidance, and investment advisers or their promoters under the IA Marketing Rule.⁶⁴

For all solicitor municipal advisors, the evaluation baseline is Rule G-17 which applies to all municipal advisors (solicitor and non-solicitor alike) and requires municipal advisors to deal fairly with all persons and not engage in any deceptive, dishonest, or unfair practice and the G-17 Excerpt for Solicitor Municipal Advisors which applies to solicitor municipal advisors. Another baseline for consideration is the IA Marketing Rule⁶⁵ for investment advisers, a merged rule that replaces the former advertising and cash solicitation rules for investment advisers. Thus, for a subgroup of solicitor municipal advisors who undertake solicitations on behalf of an investment adviser that is already subject to the requirements, the burden for compliance is already in place partially, as these solicitor municipal advisors are presumably already complying with the conditions outlined by the IA Marketing Rule. Finally, for a subset of municipal advisory firms who conduct both solicitation and non-solicitation business activities, the baseline is comprised of Rule G-17 and Rule G-42 on duties of non-solicitor municipal advisors.

The MSRB also evaluated reasonable alternative regulatory approaches. In one

⁶⁴ See 17 CFR 275.206(4)-1.

⁶⁵ Id.

alternative, the MSRB would create a new Rule G-46 for solicitor municipal advisors, but the text of the rule would state that solicitors should follow the SEC's IA Marketing Rule. The main benefit of this would be to completely harmonize between MSRB and SEC rules for solicitor municipal advisors who solicit municipal entities and obligated persons for investment advisory services. However, this alternative would reduce alignment with MSRB Rule G-42 for solicitor municipal advisors who are also non-solicitor municipal advisors and are obligated to comply with Rule G-42. Since all municipal advisors are permitted to engage in both solicitation activity and non-solicitation activity, the MSRB deems Proposed Rule G-46 superior to this alternative as it would be a tailored rule for solicitor municipal advisors that aligns with Rule G-42 where appropriate and aligns with the IA Marketing Rule where appropriate. Therefore, the MSRB believes that the approach taken in Proposed Rule G-46 for solicitor municipal advisors is warranted under the Exchange Act.

Benefits

The main benefit of Proposed Amended Rule G-8 and Proposed Rule G-46 would be to codify certain statements and provide clarification on regulatory obligations for solicitor municipal advisors with regard to their duties. By aligning Proposed Rule G-46 with Rule G-42, Rule G-17 and the IA Marketing Rule⁶⁶ where appropriate, Proposed Amended Rule G-8 and Proposed Rule G-46 would enhance the consistency of regulatory standards, thereby removing burdens to competition because it would provide clear expectations for all solicitor municipal advisors that are generally consistent with the standards under the comparative rules.

⁶⁶ 17 CFR 275.206(4)-1.

For example, Proposed Rule G-46 would make clear the types of disclosures that a solicitor municipal advisor would be expected to make to solicited entities in order to ensure that such entities have access to material information to inform their decisions pertaining to whether to retain the solicitor municipal advisor's client(s). This information also would assist these solicited entities in evaluating the solicitor municipal advisor's potential conflicts of interest associated with making such solicitations. Additionally, by codifying much of the G-17 Excerpt for Solicitor Municipal Advisors with additional requirements, Proposed Rule G-46 expressly would prohibit solicitor municipal advisors from making certain false or materially misleading representations about their clients and would require them to have a reasonable basis for similar representations in order to help ensure the protection of the municipal entities and obligated persons solicited by such solicitor municipal advisors.

Furthermore, the codification of certain existing requirements and the expansion of those standards in the proposed rule change would enhance transparency for the recipients of the new disclosures that would be required by the proposed rule change and promote clearer regulatory obligations for solicitor municipal advisors. The proposed rule change also would provide protection for municipal entities and obligated persons of solicitations, further promoting fair dealings between the market participants. As mentioned above, the additional requirements also would align some of the obligations imposed on solicitor municipal advisors with those applicable to non-solicitor municipal advisors under Rule G-42 and underwriters under the G-17 Underwriter's Guidance as well as those applicable to certain endorsements and testimonials in connection with certain investment adviser advertisements under the SEC's investment adviser regime.

This alignment would level the playing field by applying somewhat similar obligations for different regulated entities and increasing the efficiency for regulatory entities tasked with examining and enforcing such requirements and regulated entities seeking compliance. In particular, Proposed Rule G-46 would require solicitor municipal advisors to document their relationships in writing to the solicitor client, which would be instrumental in assisting examining authorities and other regulators to determine the relevant regulatory regime applicable to a solicitor municipal advisor's solicitation.

Costs

The MSRB acknowledges that solicitor municipal advisors likely would incur costs, relative to the baseline state, to meet the standards of conduct and duties contained in the proposed rule change. These changes may include the one-time upfront costs related to setting up and/or revising policies and procedures, as well as the ongoing costs such as compliance costs associated with maintaining and updating disclosures. Solicitor municipal advisors also may have additional costs associated with additional record-keeping.

For the upfront costs, it is possible that solicitor municipal advisors may need to seek the appropriate advice of in-house or outside legal and compliance professionals to revise policies and procedures in compliance with Proposed Amended Rule G-8 and Proposed Rule G-46. Solicitor municipal advisors also may incur costs related to standards of training in preparation for the implementation of Proposed Amended Rule G-8 and Proposed Rule G-46. Assuming solicitor municipal advisors currently already have policies and procedures in place in relation to the G-17 Excerpt for Solicitor Municipal Advisors, the upfront costs for Proposed Amended Rule G-8 and Proposed

Rule G-46 should be incremental. Furthermore, the upfront costs may be lower for solicitor municipal advisors that are also non-solicitor municipal advisors as they presumably are already complying with similar Rule G-8 and Rule G-42 requirements. Similarly, such costs may be lower for solicitor municipal advisors who are soliciting on behalf of investment advisory business and therefore presumably are already complying with the IA Marketing Rule.⁶⁷

For the ongoing costs, solicitor municipal advisors may incur compliance costs related to each solicitation, including costs pertaining to creating and maintaining books and records. Firms may have to make changes to their current recordkeeping practices in order to satisfy the additional requirements of Proposed Amended Rule G-8 and Proposed Rule G-46 for the specific disclosures to a solicited entity as outlined above, such as the creation of disclosures for all material information regarding the role and compensation of the solicitor municipal advisor; documentation of the relationship between a solicitor municipal advisor and its solicitor client; disclosure of material conflicts of interest; and certain payments made by a solicitor municipal advisor to another solicitor municipal advisor.

Table 1 below shows the number of solicitor municipal advisory firms registered with the MSRB as of the end of January 2022. The table groups together solicitor municipal advisor only firms (meaning those firms that indicated to the MSRB that they engage in solicitation activity only and not non-solicitation municipal advisory activity) and separately groups together those solicitor municipal advisor firms that indicated to

⁶⁷ 17 CFR 275.206(4)-1.

the MSRB in Form A-12 that they engage in both solicitation and non-solicitation municipal advisory activities (e.g., under some engagements, they conduct solicitations of municipal entities and/or obligated persons whereas pursuant to other engagements, they provide covered advice to municipal entities and/or obligated persons). Table 1 also illustrates the type of solicitation activity in which solicitor municipal advisory firms registered with the MSRB engage (i.e., solicitations for investment advisory business versus other solicitations), as reported by solicitor municipal advisory firms on Form A-12.⁶⁸

Table 2 illustrates preliminary estimates for both the upfront and ongoing compliance costs assuming implementation of Proposed Amended Rule G-8 and Proposed Rule G-46 for each solicitor municipal advisory firm in its respective group who chooses to continue their solicitation business practice in the future state.⁶⁹ As of

⁶⁸ Pursuant to MSRB Rule A-12, on registration, all municipal advisors, including solicitor municipal advisors, must register with the MSRB prior to engaging in any municipal advisory activity. Form A-12 is the single, consolidated form for registrants to provide the MSRB with registration information required under Rule A-12. Among other things, Form A-12 is used to: register with the MSRB, update registration information following a change to any information contained in the form and affirm registration information on an annual basis. The data in Tables 1 and 2 below regarding the number and breakdown of solicitor municipal advisor firms and the types of activities in which they engage is derived from Form A-12 data submitted to the MSRB.

⁶⁹ Hourly rate data are gathered from the 2021 SEC's Amendments Regarding the Definition of "Exchange" and "Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities," 17 CFR Parts 232, 240, 242, and 249. The SEC's Economic Analysis utilizes the Securities Industry and Financial Markets Association, Management & Professional Earnings in the Securities Industry—2013 Report for the hourly rates of various financial industry market professionals. To compensate for inflation, "the 2013 professional wage rates are adjusted for an inflation rate of 17.45 percent based on the Bureau of Labor Statistics data on Consumer Price Index for all Urban Consumers (CPI-U)

January 2022, there is a total of 86 municipal advisory firms registered with the MSRB who indicated solicitation business activities on Form A-12, with 17 of those firms indicating that they engage solely in solicitation activities and the remaining 69 firms indicating they engage in both solicitation and non-solicitation municipal advisory activities.⁷⁰ Of the 17 municipal advisory firms engaging solely in solicitation activities, 16 firms (9 + 7) indicate solicitation activities made on behalf of investment advisory business and one firm indicates solicitation activities only made on behalf of non-investment advisory business. Of the 69 municipal advisory firms engaging in both solicitation and non-solicitation activities, 47 firms (20 + 27) indicate solicitation activities made on behalf of investment advisory business and 22 firms indicate solicitation activities only made on behalf of non-investment advisory business.

between September 2013 and September 2021” (Page 452). The MSRB added an additional five percentage points for relevant roles mentioned by the SEC and captured in SIFMA’s 2013 Report to account for an increase in salary inflation for 2022. The inflation-adjusted effective hourly wage rates for in-house attorneys are estimated at \$465 (\$380 x 1.2245), \$594 (\$485 x 1.2245) for chief compliance officers, \$347 (\$283 x 1.2245) for compliance managers, and \$490 (\$400 x 1.2245) for outside counsel.

⁷⁰ As previously mentioned, the MSRB utilized Form A-12 data for the economic analysis provided. Of note, the MSRB identified that between FY 2021-Q2 (January – March) and FY 2022-Q2 there was a 11.7% decline in the total number of registered municipal advisory firms. The number of solicitor municipal advisory firms, including firms with both solicitation and non-solicitation activities, also decreased from 105 to 86 firms during the same period.

Table 1. Number of Solicitor Municipal Advisory Firms⁷¹

| Business Activities | Number of Firms |
|---|------------------------|
| Firms with Solicitation Activities Only | 17 |
| Investment Advisory Business Only | 9 |
| Non-Investment Advisory Business Only | 1 |
| Both | 7 |
| Firms with Solicitation and Non-Solicitation Activities | 69 |
| Investment Advisory Business Only | 20 |
| Non-Investment Advisory Business Only | 22 |
| Both | 27 |
| Total | 86 |

Table 2. Estimated Incremental Compliance Costs for Each Solicitor Municipal Advisory Firm

| Cost Components | Projected Hourly Rate for 2022 | 17 Firms with Solicitation Activities Only | | | | 69 Firms with Solicitation and Non-Solicitation Activities | | | |
|---|--------------------------------|--|---------------|--|---------------|--|---------------|--|---------------|
| | | 16 Firms On Behalf of Investment Advisory Business | | One Firm Not On Behalf of Investment Advisory Business | | 47 Firms On Behalf of Investment Advisory Business | | 22 Firms Not On Behalf of Investment Advisory Business | |
| | | Number of Hours | Cost per Firm | Number of Hours | Cost per Firm | Number of Hours | Cost per Firm | Number of Hours | Cost per Firm |
| Upfront Cost | | | | | | | | | |
| a) Revision of Policies and Procedures | \$ 490 | 3.50 | \$ 1,715 | 4.50 | \$ 2,205 | 3.00 | \$ 1,470 | 4.00 | \$ 1,960 |
| b) Training | \$ 594 | 1.25 | \$ 743 | 1.75 | \$ 1,040 | 1.25 | \$ 743 | 1.75 | \$ 1,040 |
| Ongoing Compliance Cost - Per Each Solicitation | \$ 465 | 2.25 | \$ 1,046 | 3.25 | \$ 1,511 | 2.25 | \$ 1,046 | 3.25 | \$ 1,511 |

⁷¹ The MSRB uses the higher hourly rate in each category of costs. For example, while the revision of policies and procedures can be conducted by either an in-house attorney (average hourly rate \$465) or outside counsel (average hourly rate \$490), the MSRB chooses the higher hourly rate for this analysis to be aggressive in the cost estimate. Similarly, for both the training and the ongoing compliance cost per each solicitation, the task can be performed by either a Chief Compliance Officer (average hourly rate of \$594), an in-house compliance attorney (average hourly rate \$465) or an in-house compliance manager (average hourly rate \$347), and the MSRB chooses the Chief Compliance Officer rate for the training and the compliance attorney rate for the ongoing compliance cost in the estimates.

As previously mentioned, the incremental costs for the subgroup of solicitor municipal advisory firms soliciting on behalf of investment advisory business may be lower than other solicitor municipal advisory firms to the extent that such solicitor municipal advisors engage in solicitations that are subject to the IA Marketing Rule.⁷² These solicitor municipal advisors are presumed to have policies and procedures consistent with, although not necessarily identical to, some of the requirements under Proposed Amended Rule G-8 and Proposed Rule G-46. In addition, the MSRB assumes that municipal advisory firms that engage in both solicitation and non-solicitation activities are currently in compliance with Rule G-8 and Rule G-42 with respect to their non-solicitation municipal advisory activities. The MSRB believes these firms may be able to leverage some of their existing Rule G-8 and Rule G-42 policies and procedures, resulting in a potentially lower upfront cost for implementing Proposed Amended Rule G-8 and Proposed Rule G-46 as compared to municipal advisory firms that engage in solicitation activities only. For example, municipal advisory firms that engage in both solicitation and non-solicitation activities are likely accustomed to documenting their relationships in an engagement letter and may be able to leverage their existing supervisory and compliance framework to extend it to their solicitation activities.

Effect on Competition, Efficiency, and Capital Formation

The MSRB believes that Proposed Amended Rule G-8 and Proposed Rule G-46 would neither impose a burden on competition nor hinder capital formation, as the proposed rule changes bring a similar regulatory regime to solicitor municipal advisors that currently exists for non-solicitor municipal advisors under Rule G-8 on

⁷² 17 CFR 275.206(4)-1.

recordkeeping and Rule G-42 and for underwriters under the G-17 Underwriter's Guidance. The MSRB believes that the proposed rule change would improve the municipal securities market's operational efficiency by providing solicitor municipal advisors with a clearer understanding of regulatory obligations, as well as enhancing the transparency and protection for recipients of the solicitations, further promoting fair dealings between market participants.

At present, the MSRB is unable to quantitatively evaluate the magnitude of the efficiency gains or losses, but believes the overall benefits accumulated over time for market participants would outweigh the upfront costs of revising policies and procedures and ongoing compliance and recordkeeping costs by solicitor municipal advisors.

Finally, the proposed rule change would apply equally to all solicitor municipal advisors. Therefore, the MSRB does not expect that Proposed Amended Rule G-8 and Proposed Rule G-46 would impose a burden on competition with respect to solicitor municipal advisory services, as the upfront costs are expected to be relatively minor for all solicitor municipal advisory firms while the ongoing costs are expected to be proportionate to the size and business activities of each solicitor municipal advisory firm. In fact, the proposed rule change may relieve a burden on competition. Therefore, the MSRB believes the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The MSRB solicited comment on the proposed rule change in two requests for comment. The MSRB first sought comment on a draft of Rule G-46 in a request for

comment that was published in March 2021 (the “First Request for Comment”).⁷³ The MSRB again sought comment on a revised draft of Rule G-46 that was published in December 2021 (the “Second Request for Comment”).⁷⁴

The MSRB received three comment letters in response to the First Request for Comment⁷⁵ and another three comment letters in response to the Second Request for Comment.⁷⁶ The comments are summarized below by topic and MSRB responses are provided.

As described above, Proposed Rule G-46 would establish the core standards of conduct and duties of solicitor municipal advisors when engaging in certain solicitation

⁷³ See MSRB Notice Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46 (March 17, 2021) available at: <https://msrb.org/sites/default/files/2021-07.pdf>.

⁷⁴ See MSRB Notice 2021-18, Second Request for Comment on Fair Dealing Solicitor Municipal Advisor Obligations and New Draft Rule G-46 (December 15, 2021) available at: <https://msrb.org/sites/default/files/2021-18.pdf>.

⁷⁵ Comments were received in response to the First Request for Comment from: National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated June 17, 2021 (“NAMA I”); Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated June 17, 2021 (“SIFMA I”); and 3PM I, *supra* note 8. Comment letters are available here.

⁷⁶ Comments were received in response to the Second Request for Comment from: National Association of Municipal Advisors: Letter from Susan Gaffney, Executive Director, dated March 15, 2022 (“NAMA II”); Securities Industry and Financial Markets Association: Letter from Leslie M. Norwood, Managing Director and Associate General Counsel, dated March 15, 2022 (“SIFMA II”); and Third-Party Marketers Association: Letter from Donna DiMaria, Chairman of the Board of Directors and Chair of the 3PM Regulatory Committee, dated March 15, 2022 (“3PM II”). Comment letters are available here.

activities. The proposed rule also would codify certain statements from the G-17 Excerpt for Solicitor Municipal Advisors and add additional requirements that would better align some of the obligations imposed on solicitor municipal advisors with those applicable to: non-solicitor municipal advisors under Rule G-42; underwriters under Rule G-17; and certain solicitations undertaken on behalf of third-party investment advisers under the IA Marketing Rule.

Harmonization with Other Rules

Commenters were supportive of harmonization efforts between the standards set forth in the requests for comment and those applicable to other regulated entities. In response to the First Request for Comment, commenters urged even more harmonization with those standards,⁷⁷ in particular Rule G-42 since issuers would be familiar with the requirements applicable to municipal advisors and greater conformance with those standards would permit issuers to receive disclosures in a format with which they may already be familiar.⁷⁸

The MSRB made a number of refinements to draft Rule G-46, as reflected in the proposed rule change. Key changes are discussed in the context of the MSRB's summary of comments and responses thereto below.

Applicability of Fiduciary Duty

In the First Request for Comment, the MSRB did not specifically include any

⁷⁷ See NAMA I at 1-2; see generally SIFMA I.

⁷⁸ See NAMA I at 1-2.

draft text regarding the application of a fiduciary duty to solicitor municipal advisors. However, the MSRB sought comment as to whether such a statement would be helpful to solicited entities. Commenters generally supported adding a clear statement to the rule text indicating that solicitor municipal advisors do not owe a federal fiduciary duty to either their clients or the municipal entities and obligated persons that they solicit.⁷⁹ They also advocated for a similar mandatory disclosure to solicited entities.⁸⁰ While one commenter did not see an appreciable benefit to requiring any such disclosure, this commenter did not raise any objections to such disclosure either.⁸¹

In response, in the Second Request for Comment, the MSRB revised draft Rule G-46 to add additional supplementary material to the draft rule. This supplementary material expressly stated that solicitor municipal advisors must comply with their fair dealing obligations pursuant to Rule G-17 on fair dealing, but that they do not owe a fiduciary duty to their municipal entity and obligated person clients in connection with their solicitation activities. The MSRB also revised the draft rule text to require a similar disclosure to be provided to the solicitor municipal advisor's solicited entities. The substance of this supplementary material as well as the draft disclosure requirement also are reflected in the proposed rule change.

Solicitor Representations

In response to the First Request for Comment, draft rule text set forth standards

⁷⁹ See SIFMA I at 1-2.

⁸⁰ See NAMA I at 1 and SIFMA I at 4.

⁸¹ See 3PM I at 7.

regarding solicitor municipal advisor representations to solicited entities. Commenters generally urged the MSRB to narrow these draft standards.⁸² One commenter suggested that the standards should only apply to a subset of a solicitor's representations (generally regarding the capacity and resources of the municipal advisor). This commenter also suggested that the applicable standard more closely mirror that posed in the G-17 Excerpt for Solicitor Municipal Advisors.⁸³

In the Second Request for Comment, the MSRB revised the draft rule text accordingly and in a manner that is consistent with the standard set forth in the proposed rule change. The MSRB believes that this more narrow standard is consistent with the standard applicable to non-solicitor municipal advisors and that these standards, in concert with a solicitor municipal advisor's Rule G-17 fair dealing obligations, offer appropriate protections to entities solicited by solicitor municipal advisors.

Prohibited Conduct

The rule text in the First Request for Comment did not include a section setting forth specific conduct that would expressly be prohibited. One commenter suggested that the MSRB add such language to the rule and that such prohibitions could largely be drawn from the specifically prohibited conduct under Rule G-42.⁸⁴ In the Second Request for Comment, the MSRB proposed a new section to draft Rule G-46 that would prohibit solicitor municipal advisors from: (i) receiving excessive compensation and (ii) delivering a materially inaccurate invoice. Additionally, the MSRB sought comment as to

⁸² See SIFMA I 2-3.

⁸³ See *id.* at 2.

⁸⁴ See *id.* at 3-4.

how to determine that compensation for a solicitation is excessive.

In response to the Second Request for Comment, one commenter stated that the provision to prohibit excessive compensation should be excluded noting, in part, the challenges in determining the appropriate compensation a solicitor municipal advisor should earn. In the alternative, this commenter suggested that the MSRB should provide guidance as to how excessive compensation should be determined.⁸⁵ In response, the MSRB determined not to include in the proposed rule change the prohibition on excessive compensation. The MSRB notes that, solicitor municipal advisors are already subject to a general duty of fair dealing under Rule G-17 and unlike the clients of non-solicitor municipal advisors, solicitor municipal advisor clients are not municipal entities and investors, but instead are themselves regulated financial professionals. As a result, the MSRB believes that the potential benefits associated with such a prohibition may not be sufficiently outweighed by the burdens associated with determining and demonstrating compliance. Additionally, the proposed rule change reflects the addition of another specified prohibition pertaining to third-party payments, which was added in response to a comment regarding the use of solicitors and the establishment of a more level playing field between solicitor municipal advisors and dealers (discussed further below).

Documentation of the Relationship

In the First Request for Comment, draft Rule G-46 proposed to require solicitor municipal advisors to document their relationship and would have required such documentation to include relatively limited content—in part to align with standards under

⁸⁵ See 3PM II at 1-3.

the IA Marketing Rule.⁸⁶ One commenter stated that the draft requirement to document the solicitor municipal advisor's engagement should be more aligned with a non-solicitor municipal advisor's obligation to document its municipal advisory relationship under Rule G-42 (which includes additional terms not set forth in the First Request for Comment).⁸⁷ In the Second Request for Comment, the MSRB added two additional draft elements that would be required to be included in such engagement, both of which are required under Rule G-42 and pertain to termination of the relationship. The MSRB also sought comment as to whether additional information regarding the terms of such documentation may be warranted.

In response to the Second Request for Comment, while one commenter stated that the draft text of draft Rule G-46 adequately captured the description of the compensation arrangement,⁸⁸ another commenter stated that the MSRB should provide additional information regarding the terms and amount of compensation to be received by a solicitor (a term that would be required to be included in the documentation of the relationship).⁸⁹

The proposed rule change currently reflects a new Supplementary Material .04, which provides additional detail regarding written disclosures pertaining to a solicitor's compensation. This supplementary material is designed to inform a solicitor municipal advisor's compliance with both its documentation obligation under Proposed Rule G-

⁸⁶ 17 CFR 275.206(4)-1.

⁸⁷ See SIFMA I at 3.

⁸⁸ See SIFMA II at 8.

⁸⁹ See 3PM II at 3.

46(c)(ii) and its disclosure obligation under Proposed Rule G-46(e)(i)(D).

Required Disclosures

In the First Request for Comment, the MSRB proposed to require solicitor municipal advisors to disclose to solicited entities certain: role and compensation disclosures; conflicts disclosures; and solicitor client disclosures. Commenters did not oppose a draft obligation to make such disclosures but suggested that the MSRB modify them in some respects. One commenter suggested that the MSRB could better align the types of required disclosures with those required by non-solicitors under Rule G-42.⁹⁰ Another stated that the MSRB should require solicitors to make certain disclosures to their clients regarding their conflicts of interest and legal and disciplinary history.⁹¹ This commenter also suggested that solicitor municipal advisors should be permitted to customize their role-based disclosures.⁹²

Commenters also suggested that the MSRB align the timing and manner of required disclosures with the standards set forth under Rule G-42⁹³ and requested guidance from the MSRB as to what qualifies as evidence that disclosure was provided in the manner set forth under the draft rule. While one commenter supported an option to make oral disclosures if the MSRB were to provide additional guidance in this area, another commenter was not supportive of such an option.⁹⁴ Finally, one commenter

⁹⁰ See NAMA I at 1-2.

⁹¹ See 3PM I at 6-7.

⁹² See id. at 1.

⁹³ See SIFMA I at 4.

⁹⁴ See id. at 11.

suggested a bifurcated approach to disclosures for solicited entities, which would permit the solicitor municipal advisor to provide an initial set of disclosures to the person solicited followed by a second set of disclosures at the time of capital allocation that would increase the likelihood that an official with the authority to bind the solicited entity by contract would see such disclosures.⁹⁵

In the Second Request for Comment, the MSRB revised the timing and manner of such disclosures in response to comments received and also sought comment as to whether disclosures should be permitted to be provided orally, consistent with the IA Marketing Rule.⁹⁶ In response, commenters generally indicated that the revised timing and manner of disclosures was workable and less burdensome than the approach initially proposed.⁹⁷ However, one commenter requested clarification regarding whether, in the case of an indirect solicitation, the disclosure requirement would be met if a solicitor municipal advisor presents the requisite disclosures to an intermediary to be passed on to an official of the solicited entity.⁹⁸ Additionally, two commenters stated that disclosures should be provided in writing,⁹⁹ while another commenter responded that disclosures should be permitted to be provided orally only if the MSRB can provide proper guidance

⁹⁵ See 3PM I at 3.

⁹⁶ 17 CFR 275.206(4)-1.

⁹⁷ See 3PM II at 7-8.

⁹⁸ See 3PM II at 3-4.

⁹⁹ See NAMA II at 2 and SIFMA II at 8.

as how to meet a solicitor municipal advisor's books and records obligations.¹⁰⁰

In response to these comments, the proposed rule change currently reflects a slightly modified approach as compared to that set forth in the Second Request for Comment. As discussed above, a solicitor municipal advisor would be expected to provide the first set of disclosures for a solicited entity to the person actually solicited. For indirect solicitations, the second set of disclosures must be presented to an official of the solicited entity. However, the proposed rule change expressly provides that an intermediary would be permitted to pass such disclosures on to such official. After reviewing the comments received, the MSRB determined to retain the requirement that all disclosures be provided in writing.

The MSRB believes that it is important that all solicited entities receive consistent role disclosures from the solicitor municipal advisors that solicit them. Accordingly, the proposed rule change requires solicitor municipal advisors to use identical language in connection with their role disclosures. The MSRB also believes that as registered municipal advisors, solicitor municipal advisors have been required to keep appropriate books and records in order to show compliance with other relevant MSRB rules and that they can leverage similar processes and experiences to determine what evidence would establish that disclosures were made in the manner required by the proposed rule change. If compliance resources would assist solicitor municipal advisors in their compliance efforts, the MSRB is prepared to produce such resources as solicitor municipal advisors begin to implement new policies and procedures to comply with Proposed Rule G-46, if

¹⁰⁰ See 3PM II at 6.

approved by the Commission.¹⁰¹

Clarification of Solicitor Municipal Advisory Activity

Commenters asked the MSRB to provide guidance on certain areas relevant to the definition of a municipal advisor, including when the solicitation of an obligated person would cause one to be a solicitor municipal advisor as well as when the solicitation of an intermediary of a municipal entity would cause one to be a solicitor municipal advisor.

The MSRB believes that the more appropriate regulator to whom to direct such comments may be the Commission. Commenters may wish to consult the Commission's set of Frequently Asked Questions pertaining to registration as a municipal advisor.¹⁰²

The Use of Solicitors

One commenter emphasized the importance of creating a level playing field between dealers and municipal advisors, noting that under Rule G-38, on solicitation of municipal securities business, dealers are currently prohibited from providing payment to unaffiliated persons for a solicitation of municipal securities business on behalf of the dealer.¹⁰³ This

commenter suggested that a similar standard should apply with respect to solicitor municipal advisors, such that Proposed Rule G-46 expressly should prohibit solicitor

¹⁰¹ Additionally, if the proposed rule change is approved, the MSRB expects to revise the G-17 Excerpt for Solicitor Municipal Advisors to reflect the adoption of Proposed Rule G-46.

¹⁰² See SEC, Registration of Municipal Advisors Frequently Asked Questions, available at: SEC.gov Registration of Municipal Advisors Frequently Asked Questions.

¹⁰³ See SIFMA II at 2-3.

municipal advisors from paying other third-party solicitors to solicit municipal advisory business on their behalf. This commenter further suggested that, if the MSRB deemed not to extend this prohibition to solicitor municipal advisors, it should permit both dealers and municipal advisors to pay solicitor municipal advisors for their third-party solicitation efforts; provided, that such solicitors are subject to comprehensive pay-to-play regulation.

As described above, Exchange Act Sections 15B(e)(4) and 15B(e)(9)¹⁰⁴ permit municipal advisors to engage in certain solicitation activities on behalf of third-party dealers, municipal advisors, and investment advisers. MSRB Rule G-38 (which pre-dates the amendments to the Exchange Act that brought municipal advisors under the MSRB's regulatory jurisdiction) prohibits dealers from paying third parties for such solicitation activities. Non-solicitor municipal advisors are similarly subject to a restriction on paying third parties for solicitation activities on their behalf, subject to an exception.¹⁰⁵ Unlike dealers, non-solicitor municipal advisors are permitted to pay reasonable fees to another registered municipal advisor for such solicitation.

In response to commenters and as discussed above, the proposed rule change would extend a similar prohibition (and related narrow exception) to solicitor municipal advisors. Because registered municipal advisors are permitted to engage in both solicitation and non-solicitation municipal advisory activities, the MSRB believes that this is the appropriate approach to harmonization among regulated entities. The MSRB notes that, unlike dealers, municipal advisors owe their municipal entity clients a

¹⁰⁴ 15 U.S.C. 78o-4(e)(4) and 15 U.S.C. 78o-4(e)(9).

¹⁰⁵ See Rule G-42(e)(i)(E).

fiduciary duty, which may mitigate any potential risk associated with municipal advisor use of third-party solicitors. As a result, the MSRB believes that the current approach taken in the proposed rule change represents an appropriate approach to protecting municipal entities and obligated persons.

Books and Records

In the First Request for Comment, the MSRB proposed to include the books and records obligations relevant to draft Rule G-46 in the text of draft Rule G-46 itself. In the Second Request for Comment, the MSRB explained that it proposed to take a similar approach with respect to future MSRB rules or rule amendments. A number of commenters opposed this standard and urged the MSRB to move the relevant books and records requirements into Rule G-8, on books and records, as regulated entities are more accustomed to consulting that rule to identify their relevant books and records obligations.¹⁰⁶ As discussed above, the proposed rule change proposes to amend Rule G-8 to take such an approach.

Inadvertent Solicitations

In the First Request for Comment and the Second Request for Comment, the MSRB did not propose a safe harbor for inadvertent solicitations. One commenter recommended that the MSRB consider such a safe harbor provision, modeled off of the safe harbor provision in Rule G-42.¹⁰⁷ The MSRB determined not to include such a provision in the proposed rule change because even a one-time solicitation could result in a solicitor municipal advisor's client getting hired and providing services to the municipal

¹⁰⁶ See SIFMA I at 4, NAMA II at 2 and SIFMA II at 4-5.

¹⁰⁷ See SIFMA I at 6 and SIFMA II at 4.

entity or obligated person solicited. As a result, the MSRB believes that it is important that the solicited entity has all of the protections afforded by the proposed rule change and that all of the other obligations under Rule G-46 are met. The MSRB notes that the proposed rule change would apply only to certain solicitations on behalf of unaffiliated dealers, municipal advisors or investment advisers. As a result, if a firm solicits an entity only on its own behalf or even on behalf of an entity that controls, is controlled by, or is under common control with the soliciting firm, the proposed rule change would not apply.

Other

In the First Request for Comment and the Second Request for Comment, the MSRB inquired whether a municipal advisor client should be required to make a bona fide effort to ascertain whether the solicitor municipal advisor has provided to solicited entities the required disclosures related to a municipal advisor client. The MSRB also sought comment as to whether there would be value to solicited entities receiving disclosures regarding the payments made by one solicitor municipal advisor to another to facilitate a solicitation.

With respect to the bona fide effort requirement, commenters were not supportive of such a requirement¹⁰⁸ and the proposed rule change does not impose this obligation on municipal advisor clients of solicitor municipal advisors. With respect to the comment regarding payments made by one solicitor municipal advisor to another, commenters indicated that such disclosures are important and supported an obligation to require such

¹⁰⁸ See 3PM I at 8 and 3PM II at 7.

disclosures.¹⁰⁹ The MSRB subsequently refined draft Rule G-46 to require the disclosure of such payments. This obligation appears in Proposed Rule G-46(e)(i)(E).

One commenter suggested that reference to obligated persons should be removed from the definitions of solicitor municipal advisor and solicited entity, noting that they are not relevant for the purposes of the activity in which solicitors typically engage.¹¹⁰ Because the MSRB has an obligation to protect both municipal entities and obligated persons and because solicitor municipal advisors may (within the scope of their professional qualification activities) solicit obligated persons, the MSRB believes that it is important that the proposed rule change extend the same protections afforded to municipal entities under Proposed Rule G-46 to obligated persons as well.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the *Federal Register* or within such longer period of up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

¹⁰⁹ See SIFMA II at 9 and 3PM II at 7.

¹¹⁰ See 3PM I at 4.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>);
or
- Send an email to rule-comments@sec.gov. Please include File Number SR-MSRB-2023-02 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR-MSRB-2023-02. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and

3:00 pm. Copies of the filing also will be available for inspection and copying at the principal office of the MSRB. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MSRB-2023-02 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, pursuant to delegated authority.¹¹¹

Sherry R. Haywood,

Assistant Secretary.

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¹¹¹ 17 CFR 200.30-3(a)(12).